

Chapter 18

MINDFULNESS AND PROFESSIONALISM

JAN L. JACOBOWITZ

“You are a cheat!” shouted the attorney to his opponent.

“And you are a liar!” bellowed the opposition.

Banging his gavel loudly, the judge interjected, “Now that both attorneys have been identified for the record, let’s get on with the case.”

—Anonymous

Perhaps it’s the grain of truth and the ring of familiarity that make this dusty old chestnut timelessly entertaining. The two lawyers share an acute professionalism problem, and the judge seems to be affirming that, in the case of these two, being unprofessional is part of their professional identity. At the end of the day, behaving unprofessionally is just what they do and who they are.

I. The True Professional: Passion and Reflection in Balance

Many thoughtful scholars, jurists, and lawyers have puzzled over the precise constituent elements of legal professionalism, with much good accomplished through the journey but no consensus reached—or perhaps even possible—on a comprehensive definition of professionalism. It seems fair to suggest, though, that we can all agree on a few foundational elements, such as honesty, civility, loyalty, and a service orientation. Other concise formulations of professionalism seem incontrovertible. For example, Neil Hamilton and Verna Monson have offered this definition, a distillation of extensive research:

Professionalism is an internalized moral core characterized by a deep responsibility or devotion to others—particularly the client—and some restraint of self-interest in carrying out this responsibility. . . . Professionalism [may also include] these elements: ongoing solicitation of feedback and self-reflection, an internalized standard of excellence at lawyering skills, integrity, honesty, adherence to the ethical codes, public service (especially for the disadvantaged), and independent professional judgment and honest counsel.

However we come to view the pieces of professionalism, it is plain that the words of the two lawyers in the opening dialogue above, and the intemperate and uncivil impulses necessarily underlying them, fall on the opposite end of the spectrum from the acts of a truly professional lawyer. In order to internalize both the reflective and passionate traits of the true professional, lawyers and judges must develop dependable habits that keep them from acting on impulse, out of anger, without careful reflection, or in other ways that undermine and defeat a commitment to civil and professional conduct.

What emerges from the components of professionalism is recognition of an overarching need for ongoing thoughtful discourse, decision-making, and reflection by lawyers and judges on their professional conduct. Whether an individual is confronted with an ethical dilemma, a hostile opposing counsel, a challenging client, or an injustice in the legal system, the individual's response to the situation is governed by his or her unique

combination of emotional experience and logical thought process, which yields a final decision as to how to respond. Intense emotions may cause a person to impulsively make a decision that unwisely focuses on the immediate circumstances rather than the impact of the decision on the long-term goal. In fact, an impulsive first reaction tends to be evidence of the individual's failure to effectively collect and process the information necessary to consider the long-term goal before deciding to take action. In other words, a failure to recognize and manage emotions may lead to less than optimal decision-making—the type of decision-making that in turn lacks professionalism.

The lawyers who chose to yell “cheat” and “liar” in the opening dialogue arguably began their emotional outbursts as a consequence of a failure to recognize and modulate their emotions. Perhaps in the heat of battle, each of their focuses narrowed to a short-term goal of aggressively attacking opposing counsel and defending their own integrity rather than considering longer-term goals such as the impact of their conduct upon the judge, upon their likelihood of success in the case, and upon their overall reputations.

II. The Idea of Mindfulness

Presuming for this discussion that these attorneys' reactions stemmed from a lack of mindfulness, let's rewind the exchange to see how it might have differed had at least one of these lawyers engaged in mindful decision-making. It would be good to start the analysis with an explanation of “mindfulness.” Jon Kabat-Zinn, the founder of the Mindfulness Based Stress Reduction Program, which is taught throughout the country, defines mindfulness as “paying attention in a particular way, on purpose, in the present moment, and nonjudgmentally.”

In other words, the idea of the practice of mindfulness is that it provides a heightened awareness of whatever event is occurring in your life in the present moment, and how you are thinking, feeling and experiencing the event. For example, think about a recent experience that you may have had when a family member, friend, colleague, professor, or even a stranger engaged in behavior that disappointed or offended you. How did you *react or overreact*?

Perhaps you lashed out in anger, cried in disbelief, or internalized your emotions in a way that caused you to ruminate about the unfairness of the situation throughout the day, upset because that person “ruined your day.” Any of one of these reactions would certainly not be uncommon, but do you remember what you were thinking, what emotions you experienced, and how the event may have affected your body in that moment? Perhaps you remember thinking about the unfairness of the other person’s conduct and feeling so angry that your heart was racing. Maybe you wish you had not said what you did, or conversely that you had spoken rather than felt paralyzed by your emotions.

The idea of mindfulness is to enable you to notice, in the moment, that you are experiencing these thoughts, feelings and bodily sensations so that you may place a *pause* between the event that is occurring and your *response* to the event. It is important to be conscious of the difference between the words *react* and *response* in this context. *Reactivity* is what may occur when a person instantaneously lashes out in anger even though that is not the optimal response to a situation. A person’s awareness of the fact that he is experiencing anger may provide the pause necessary to modulate the anger and *respond* in a more productive manner. The non-judgmental aspect of mindfulness suggests that a person should not judge his anger in the moment—just noticing that he is experiencing anger is often enough to positively influence his response.

Now, let’s turn back to the attorneys who yelled “cheat” and “liar.” What prompted the first attorney to shout “cheat” is unknown, but having been called a cheat in open court in front of a judge, the second attorney, no doubt, experienced a number of thoughts, feelings, and bodily sensations. In mindfulness terms, the shouting of “cheat” is referred to as an “event”—because life, whether in the legal profession or in our personal lives, may be viewed as a series of ongoing events. Imagine that this event—the yelling of the word cheat—has put a spiral in motion. Place on the spiral the likely thoughts, feelings and bodily sensations of the second attorney. He may be thinking, “What a jerk!” “How dare he embarrass me in front of the judge!” Or just, “that’s not true!” The accused cheat may be feeling anger, disgust, and humiliation. He may also be experiencing an increased pulse, stomach disturbance, or shaking inside.

As the second attorney's thoughts, feelings, and bodily sensations travel around the spiral, they cause the type of instantaneous reactivity that in turn results in his bellowing the accusation "liar" to the first attorney. Of course the bellowing of "liar" has, no doubt, become an event for which the first attorney now has his own reactive spiral spinning with thoughts, feelings, and bodily sensations. And so, if the judge were not there to bang the gavel, one destructive spiral might continue to lead to another until some other intervening event occurred or one of the attorneys, whether in a belated moment of insight or perhaps mere exhaustion, jumps off of the spiral of reactivity.

III. The Importance of "The Pause"

How might mindfulness make a difference not only in this exchange, but also generally to stem the tide of reactivity that often occurs in interpersonal exchanges? The practice of mindfulness provides a pause between the event and an individual's response. The pause may seem subtle, but it is nonetheless dramatic.

Had the second attorney in our example "paused," he may have been able to abandon or rise above the spiral and avoid overreacting before the judge. The second attorney might have noticed that the first attorney was being highly unprofessional, that being called a cheat in front of judge was causing the second attorney *to think* that the first attorney is a liar, to *feel* extremely angry and to *notice* that his heart is racing. Having had this heightened awareness in the moment, the second attorney might have chosen to respond by simply stating his name for the record and calmly indicating that he was not in agreement with the first attorney's characterization of his character. That response would have likely created quite a different impression before the judge and perhaps diffused or altered the first attorney's state of mind.

The legal profession is replete with adversarial moments—it is the nature of our legal system. Lawyers are expected to zealously advocate for a client whether it is in a courtroom setting, a mediation, or a transactional negotiation. Often emotions run high as a client urges his lawyer to win "at all costs" or demands a "scorched earth" strategy. Opposing counsel may employ unfair tactics or a trial judge may not rule in

accordance with the current state of the law. In other words, the practice of law has no shortage of challenging situations in which lawyers may employ mindfulness to engage in professionalism by electing to thoughtfully respond. Alternatively, a lawyer may fall prey to the reactivity that often fuels unproductive and unprofessional behavior by overreacting rather than thoughtfully responding.

The question remains: how does one develop a mindful approach to life's events, and is there any "evidence" that mindfulness really makes a difference? Perhaps, for the mind engaged in legal training, the evidence should be provided before the methodology. Although the contemporary application of mindfulness in the legal profession is often traced to a law and meditation retreat at Yale Law School in 1998, and mindfulness itself stems from teachings that are thousands of years old, the recent popularity of mindfulness in legal communities across the country may partially be the result of research being conducted by neuroscientists on the neurological effects of mindfulness.

In his book, *The Mindful Brain*, Dr. Daniel J. Siegel acknowledges the anecdotal evidence of the effectiveness of mindfulness but moves beyond it to discuss the relevant brain science. In chapter one, *A Mindful Awareness*, Dr. Siegel explains:

Preliminary research involving brain function hints at the view that mindfulness changes the brain. Why would the way you pay attention in the present moment change your brain? How we pay attention promotes neural plasticity, the change of neural connections in response to experience. What we'll examine [in the book] are the possible mechanisms of how the various dimensions of mindful awareness emerge within the activity of the brain and stimulate the growth of connections in those areas. By diving deeply into direct experience, we will be able to shed some light on why research might reveal left-sided changes, right-sided changes, and global impacts on integrative functioning in the brain as a whole.

Dr. Siegel's book was first published in 2007, and since then additional scientific findings have been reported that further support the impact of

mindfulness on the brain. For example, in 2009, Amishi Jha, a neuroscientist conducting research at the University of Pennsylvania, demonstrated that mindfulness practices were associated with changes to working memory and the increased ability to minimize distraction. At UCLA's Laboratory of Neuro Imaging, Eileen Luders and her colleagues have studied the impact of meditation on the brain. In 2009 and 2011, they published the results of studies finding, among people who meditate, increased grey matter, stronger connections between brain regions, and less age-related brain thinning. Then in 2012, the same lab reported findings that mindfulness meditation was associated with larger amounts of gyrification—folding of the cortex—which may allow the brain to process information faster.

While it certainly is not necessary to be a scientist to understand or engage in mindfulness, it may be compelling, for the skeptical mind, to know that early findings from a variety of credible labs and neuroscientists across the country lend themselves to the conclusion that a mindfulness practice may not only assist a person in achieving more effective decision-making—and for the purposes of our discussion, thereby enhance professionalism—but also that mindfulness may literally cause positive changes in a person's brain.

So then how does one engage in a mindfulness practice? Fundamentally, spending a few minutes sitting quietly, lowering, or closing the eyes, and concentrating upon the breath may begin a mindfulness practice. When the mind begins to wander, which it will, just gently bring concentration back to the breath. The process is not about attempting to have the mind go “blank,” but rather about noticing thoughts, emotions and bodily sensations, without judgment, and sending them on their way, perhaps to be revisited at a later time, while returning the focus to the breath.

The process is easy to describe, but may be difficult to achieve, and obtaining ultimate benefits requires regular practice. The benefits of mindfulness have been described through its use in diverse contexts. In health care facilities, mindfulness has been employed to assist with managing chronic pain; in schools, mindfulness has helped children with concentration and impulse control; and in large corporations, the goal is to improve creativity and the work environment.

In the professionalism context, mindfulness may be a tool for improved decision-making, which goes hand in hand with becoming not just a lawyer, but also a professional. Being a part of the legal profession means striving to effectively make difficult decisions while maintaining one's personal values and reputation. Mindfulness may provide enhanced clarity, especially in stressful situations, and allow for better decisions. As Phillip Moffitt explains in his book, *Emotional Chaos to Clarity*:

When you are being mindful, you are better able to clearly see what is happening in each moment of your life. As a result you gain new insights into your experience, which greatly enhances your ability to tolerate difficult situations and to make wiser decisions.

The beauty of mindfulness, and the clarity that it may provide, is that developing a mindfulness practice may be done anywhere, by a single person or in a group, in silence, or with music and a guided meditation. There are many books, websites, recorded guided meditations, classes, workshops, retreats, and community groups available to assist anyone interested in learning more about mindfulness and how to develop a mindfulness practice.

Law schools and legal communities have begun to focus on mindfulness in the context of the legal profession. University of Miami School of Law has a Mindfulness in Law Program and University of California Berkeley School of Law has a Berkeley Initiative for Mindfulness in Law. There are many other schools where professors have integrated mindfulness into their curriculum or where the school has offered mindfulness as an extracurricular program. A number of legal communities have begun mindfulness programming, such as the Miami-Dade Mindfulness in Law Task Force, which is comprised of lawyers, judges, and law students who are interested in both engaging in a mindfulness practice and increasing awareness of mindfulness throughout the legal community.

IV. Conclusion

Mindfulness and professionalism both have many dimensions, and people certainly may disagree about the significance of a particular brain

imaging study or the exact definition of legal professionalism. It is difficult to dispute, however, that enhanced decision-making based upon greater mental clarity is a valuable tool for lawyers.

In sum, mindfulness may be a valuable tool to add to your professionalism toolbox. Building a career imbued with mindfulness may naturally lead you—and those who take your cue, to a state of professionalism, which may not only enhance your reputation and success, but also will assist in elevating the stature of the legal profession in our society.

Sources/Reading

Bar Associations Involved in Mindfulness and the Law, MINDFULNESS IN LAW, <http://mindfulnessinlaw.org/Bar%20Associations/index.html> (last visited April 14, 2013).

Todd Essig, *Google Teaches Employees to ‘Search Inside Yourself’*, FORBES (Apr. 30, 2012, 9:42 PM), <http://www.forbes.com/sites/toddesig/2012/04/30/google-teaches-employees-to-search-inside-yourself/>.

Neil Hamilton & Verna Monson, *Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325 (2011).

Amishi Jha et.al., *Examining the Protective Effects of Mindfulness Training on Working Memory and Affective Experience*, 10 EMOTION 54 (2010), available at http://www.mindinsight.co.uk/docs/jha_stanley_et_al_emotion_2010.pdf.

JON KABAT-ZINN, *WHEREVER YOU GO, THERE YOU ARE: MINDFULNESS MEDITATION IN EVERYDAY LIFE* (1994).

Alan Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 QUINNIPIAC L. REV. 643 (2004).

Eileen Luders & A.W. Toga et al., *The Underlying Anatomical Correlates of Long-term Meditation: Larger Hippocampal and Frontal Volumes of Gray Matter*, 45 NEUROIMAGE 672 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3184843/>.

Eileen Luders & Kristi Clark et al., *Enhanced Brain Connectivity in Long-term Meditation Practitioners*, 57 NEUROIMAGE 1308 (2011).

Eileen Luders & Florian Kurth, et al., *The Unique Brain Anatomy of Meditation Practitioners: Alterations in Cortical Gyrification*, 6 FRONTIERS IN HUMAN NEUROSCIENCE 1 (2012).

Mindfulness in the Corporate World: How Businesses are Incorporating the Eastern Practice, HUFFPOST HEALTHY LIVING (Aug. 30, 2012, 12:30 A.M.),

http://www.huffingtonpost.com/2012/08/29/mindfulness-businesses-corporate-employees-meditation_n_1840690.html.

PHILLIP MOFFITT, EMOTIONAL CHAOS TO CLARITY: HOW TO LIVE MORE SKILLFULLY, MAKE BETTER DECISIONS, AND FIND PURPOSE IN LIFE (2012).

JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2012).

SCOTT L. ROGERS & JAN L. JACOBOWITZ, MINDFULNESS & PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM (2012).

Daniel Schneider, *Mindfulness Helps Soldiers Cope in Iraq*, U.S. DEP'T OF DEF. (Aug. 3, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=60294>.

DANIEL J. SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL BEING (2007).

Associated Press, *U.S. Marine Corps Members Learn Mindfulness Meditation and Yoga in Pilot Program to Help Reduce Stress*, N.Y. DAILY NEWS (Jan. 23 2012, 11:09 A.M.), <http://www.nydailynews.com/life-style/health/u-s-marines-learn-meditate-stress-reduction-program-article-1.1245698>.

JAN L. JACOBOWITZ is a Lecturer in Law and the Director of the Professional Responsibility and Ethics Program (PREP) at the University of Miami's School of Law. PREP was a 2012 recipient of the ABA's E. Smythe Gambrell Professionalism Award. Ms. Jacobowitz teaches Mindful Ethics: Professional Responsibility for Lawyers in th Digital Age.